80-1483

No.

Office-Supreme Court, U.S.
FILED
FEB 27 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MILLEDGEVILLE FARMER'S ELEVATOR CO.,
an Illinois Corporation,

Petitioner,

vs.

ERNEST WAGNER and ACHSIA WAGNER;
and STANLEY S. WAGNER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

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QUESTION PRESENTED FOR REVIEW

Is the procedure establishing an unequal right of appeal as between litigants in violation of the due process and equal protection clause of the Fourteenth Amendment to the Constitution of the United States?

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1980

NO.

MILLEDGEVILLE FARMER'S ELEVATOR CO., an Illinois Corporation,

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vs.

ERNEST WAGNER and ACHSIA WAGNER; and STANLEY S. WAGNER,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE APPELLATE COURT OF THE SECOND DISTRICT
STATE OF ILLINOIS

JURISDICTIONAL GROUNDS

1. The judgment of the Appellate Court of the Second District was rendered on May 13, 1980, and on rehearing, July 23, 1980. Said judgment became final on December 2, 1980, by the denial of the Petition for Leave to Appeal to the Supreme Court of Illinois. (Appendix C)

2. The opinion of the Appellate Court, Second District of Illinois, is included under Appendix A and the opinion on Rehearing as Appendix B.

3. Statutory Provisions.

(a) U.S.C. Title 28, Sec. 1257

(b) Rule 20.1, 20.3, and 20.4, Supreme Court of the United States;

(c) Rule 17(b) and 17(c), Supreme Court of the United States

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

1. Supreme Court Rule 304(a), Appendix D

2. Ill. Rev. Stat., Ch. 80, Sec. 31, Appendix E

3. Fourteenth Amendment, Appendix F

4. Article I, Sec. 2, Constitution of the State of Illinois, Appendix G

STATEMENT OF THE CASE

In two cases consolidated for trial, Ernest Wagner and Achsia Wagner and Stanley Wagner brought suit as Landlords against Milledgeville Farmer's Elevator Co., an Illinois Corporation, Petitioner herein, seeking to recover under a statutory lien for unpaid rent when Petitioner had allegedly purchased corn from the tenant. (Appendix A)

A jury rendered a verdict for Defendant against all Plaintiffs. The Trial Court granted Plaintiff a judgment n.o.v., and ordered a new trial on the issue of damages only, or in the alternative a new trial on all issues in the event the matter was reversed on appeal and found no just reason to delay appeal.

The Appellate Court of Illinois, Second District, dismissed on the grounds of lack of jurisdiction. The Supreme Court of Illinois denied leave to appeal.

HOW A FEDERAL QUESTION AROSE

The Federal question arose upon denial of jurisdiction by the Appellate Court of Illinois, Second District and denial by the Supreme Court of Illinois to review.

ARGUMENT

The Appellate Court of Illinois based its decision of lack of jurisdiction upon an interpretation of Supreme Court Rule 304(a), Appendix D, as interpreted by the Supreme Court of Illinois, in Davis v. Childers, 33 Ill. 2d 297, 211 N.E. 364 (1965), which reached its determination by applying its view of opinions interpreting Federal Rules of Civil Procedure 54(b).

The result of that determination was that while Plaintiff in reacting to a judgment n.o.v. would have a right of appeal, the Defendant, under exactly a similar ruling, would not have a right of appeal.

The Supreme Court said in Davis v. Childers, supra:

> " . . . Nor is it significant that if, in the present case, the verdict of the jury had been in favor of the Plaintiff,a judgment n.o.v. would have been appealable. The difference in appealability

> between a judgment n.o.v. in favor of a plaintiff, and a similar judgment in favor of a defendant, is a product of the settled doctrine which, except in specified instances, permits appeals from final judgments only."

We disagree. The holding is likewise manifestly inconsistent with previous holdings finding that equal rights are essential in appellate procedures and mandatory under the equal protection and due process clause of the Fourteenth Amendment of the United States Constitution.

If Plaintiff recovers a verdict which is taken from him by the Court on a j.n.o.v. a property right is involved and an appealable order. If Defendant obtains a verdict a property right is also involved, which if taken away by the Trial Court should have equal protection for purposes of appellate procedures. The obvious is accentuated in the cited case of Martino v. Barra, 37 Ill.

2d 588, at 594, 229 N. E. 2d 545 (1967) wherein the same situation as here existed and illustrates petitioner's protest. The jury found for Defendant. The Trial Court granted a judgment n.o.v. and ordered a new trial on the issue of damages only. On appeal the Appellate Court first reversed the trial court and sustained the verdict of the jury for Defendant. On rehearing, however, the Appellate Court concluded it lacked jurisdiction under Rule 304(a) and remanded to the Trial Court for a hearing on the damages. The Appellate Court, however, had already ruled the judgment in favor of defendant was correct, but not until the hearing on damages would the ritual be completed with a "final" order. The first Trial Court order of judgment n.o.v. could then be reviewed. The Appellate Court should logically and rightfully, based on its earlier finding, remand with directions to enter judgment for the Defendant. The trial

on damages would thus be wasted effort and expense to Defendant. Not only is the procedure illogical and wasteful of the Court's time from a procedural standpoint, it is equally clear that Defendant's right to due process and equal protection under the Fourteenth Amendment has been violated.

While one is not entitled to an appeal as a matter of right under the provisions of the Constitution, once an appellate procedure has been established it must be equal for all parties. A failure of equal appeal rights violates the rights of a party litigant, here petitioner, under the Fourteenth Amendment.

The following language is simply and totally incompatible with the language and holding of the Supreme Court in Davis, supra. In Hecker v. I.C.R. Company, 231 Ill. 574, 83 N.E. 456 (1908); a statute provided what the Supreme Court found to be an

inequality of appellate rights. Quoting an earlier case the Court said:

> "The legislature has the right to regulate appeals and writs of error but it has no right to discriminate between the parties. It cannot allow an appeal to one party from an adverse decision and deny it to the other. It is obvious that a law providing that the defendant should have the right to appeal from the judgment of the trial court, but the plaintiff should not would be an unjust discrimination. It is equally unjust that the appellee or defendant in error should be entitled to appeal from the judgment of the appellate court while the appellant or plaintiff in error cannot. The fact that the appellate court and the trial court have differed in their judgment affords no sensible reason for discriminating in favor of either party as to the right to appeal. If the matter is still open for an appeal it must in justice be equally open to either party. The litigants should be looked on with equal favor by the law and have the same right to appeal and the same questions should be open to each. "

In People v. Sholem, 238 Ill. 203, at Page 208, 87 N.E. 390 (1909), the Court stated:

> "Statutes giving the right to appeal should be liberally construed in furtherance of justice. A statute which was so framed that literally it is only available to one of the parties to review the proceedings should be so construed as to extend to the other party the same means for the correction of errors. The right to review should be held reciprocal and alike demandable by either party . . . the legislature has the power to regulate appeals and writs of error but in so doing it has no right to discriminate between the parties and allot one party an appeal from an adverse decision and not allow it upon equal terms to the other."

Hayward v. S. S. Sencenbaugh, 235 Ill. 580 (1908) dealt with a rule essentially the same as the instant Supreme Court Rule 304(a) as it has been applied here. The Court using constitutional rationale ruled:

> "An appeal from a judgment of the appellate court reversing a judgment and remanding the cause for a new trial would not lie to the Supreme Court (sic) as such order of the appellate court was not a final judgment and an appeal to this court would only lie from a final judgment of the appellate

> court. The Court in commenting upon that rule said: 'It would therefore seem clear that the parties litigant in this court would not stand upon an equal footing, --that is, that this court would have power to render final judgment against one party while under the same circumstances it would be powerless to render final judgment against the other party. Each party to litigation must have conferred upon him by a statute granting an appeal to this Court the same rights and be subject to the same burdens, otherwise the statute which confers the right or imposes the burden is special legislation and obnoxious to the Constitution." (citing cases) (emphasis added)

The Court concluded that the section in question was unconstitutional.

In Funkhouser v. Randolph, 287 Ill. 94, 122 N.E. 144 (1919) the Court again found a rule dealing with appeals unconstitutional as not affording equal rights and said:

> "The restrictions on such appeal or writ of error on the review of the facts found are only against the defendants in case the finding is against them.

> The unilateral restrictions of this character on the right of review are repugnant to the Constitutional provisions guaranteeing every person equal protection of the law. Every citizen has a right under such guarantees to insist that his rights of life,liberty and property shall be determined by the same rules which settle and determine similar rights of others. Green v. Red Cross Medical Service Co., 232 Ill. 616."

Sturges, et al v. Pastel, 301 Ill. 253, 254 (1921) cited Hecker v. I.C.R., supra, in support of the principal that rights ". . . granted to one party and denied to the other, then every person does not have that certain remedy of the law as guaranteed by Sec. 19 of Article II of the Constitution."

The case of Maynard v. B. F. Goodrich Co., 144 Ohio ST. 22, 56 N.E. 2d 195, 198 (1944) also dealt with the question of equal rights to an appeal. The Court observed in dealing with exactly the issue being presented to this Court:

> "The contention of defendant's counsel is that in this jurisdiction 'a plaintiff and a defendant stand on a different footing insofar as what may be done by way of granting relief to a party because of an erroneous ruling by the trial court.'"

The Court in response to that assertion agreed and stated:

> "It has been held that a statute which discriminates between persons similarly situated by not allowing an appeal on equal terms denies the equal protection of the laws (citing cases, including some of the Illinois cases cited above.)"

The same principal was followed in Griffin v. Illinois, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed 891 (1956) wherein the Court in construing an Illinois statute and finding it unconstitutional found that equal protection under the Constitution demanded that indigents have the same opportunity as non-indigents to appeal. The Griffin case reaffirmed that while an appeal was not a matter of right, any appeal rights should apply to all individuals equally.

The due process right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The ancient maxim of property rights makes it incumbent upon our process to protect those claims upon which people rely in their daily lives and this reliance cannot be arbitrarily undermined.

There is no question the case load demonstrates that a majority of those who have access to the Supreme Courts of the various states as well as to the Supreme Court of the United States are those charged with a crime. While a right of review of these individuals should not be diminished is not the "little man" entitled to equal protection for his "rights"? One wonders in light of where we are morally and economically whether or not our priorities in establishing a proper balance have been achieved.

The instant case is one in point. In the chaotic economic climate of today an elevator business trying to survive is met with the provisos of an archaic landlord's lien against a tenant's crops. (Ill. Rev. Stat.,Ch. 80,Sec.31) (Appendix) The cases indicate the lien was intended to apply only to crops still growing or upon the tenant's property and not those removed and sold. In any event a judgment was rendered in favor of the defendant at the conclusion of a total presentation of the case to a jury. Why in the world if that jury verdict is correct and Defendant is not liable, should it be required to go through the rigors, expense, delay and really punishment of a second trial on a damage issue?

The case of Martino v. Barra, supra, spotlights the problem. If the Appellate Court sustains the jury and reverses the trial court on its j.n.o.v. the whole second trial on damages is an exercise in futility depriving the defendant of his property

without just cause and without affording it the same appeal rights open to the Plaintiff in violation of the Defendant's constitutional rights.

We argue as vehemently as possible that the Illinois Supreme Court Rule 304(a) so interpreted is unconstitutional as being in violation of the Defendant's rights under the Fourteenth Amendment of the United States Constitution and Article I, Sec. 2 of the Illinois Constitution in addition to being blind adherance to an unreasonable and unrealistic position.

One can certainly conclude that even though a deprivation of property as here is perhaps only to be temporary and non-final, it still constitutes a deprivation in terms of the Fourteenth Amendment and must be proceeded by a fair hearing. A fair hearing in this case should provide the same Appellate review that is available to the Plaintiff under similar circumstances. This court has

heard a myriad of arguments on due process and equal protection under a multitudinal set of circumstances. It would appear that no case is more significant, however, than one that deals with the rights of individuals in their daily pursuit of business as it effects the common man and the market place. Certainly this is one of those cases. It is tragically unfortunate that Illinois Supreme Court Rule 304(a) has been interpreted to mean that one of the parties can appeal but the other one cannot but can be forced by a ruling of the trial court to go through an entirely unnecessary and unwarranted second trial for damages when an appeal available to Defendant (here petitioner) on the same terms and provisions available to the other side, would preclude the necessity of a trial on damages.

CONCLUSION

We respectfully submit that this Petition for a Writ of Certiorari should be granted to review the judgment of the Appellate Court of Illinois, Second District.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX A

Opinion of the Appellate Court of Illinois

STATE OF ILLINOIS
APPELLATE COURT SECOND DISTRICT
Elgin, Illinois 60120

May 13, 1980

THE COURT HAS THIS DAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

Gen. No. 79-496

Ernest Wagner & Achsia Wagner, appellees v. Milledgeville Farmer's Elevator So., (sic) a Corp., appellant. Stanley S. Wagner, appellee v. Milledgeville Farmer's Elevator Co., a Corp., appellant,

The appeal from the Circuit court of Carroll is dismissed for want of jurisdiction. (See attached order.)

LOREN J. STROTZ, Clerk

Bernard P. Reese, Jr.
John A. Leemon

NO. 79-496

ERNEST WAGNER and ACHSIA WAGNER, Plaintiffs-Appellees, v. MILLEDGEVILLE FARMER'S ELEVATOR CO., a Corporation, Defendant-Appellant. STANLEY WAGNER, Plaintiff-Appellee, v. MILLEDGEVILLE FARMER'S ELEVATOR CO., a Corporation, Defendant-Appellant.

ORDER DISPOSING OF APPEAL
UNDER SUPREME COURT RULE 23

This case was commenced by the filing of two separate complaints against the same defendant and was based upon a landlord's statutory crop lien for rent. (Ill. Rev. Stat., 1977, ch. 80, par. 31.) The cases were subsequently consolidated for trial. In May, 1979, a jury trial was held and the jury returned a verdict in favor of defendant.

On July 9, 1979, the trial court issued an order which held that the jury verdict was against the manifest weight of the evidence and that the judgment should be set aside. The order also granted judgment n.o.v. in favor of plaintiffs and against defendant on the issue of liability, and ordered a new trial on the question of damages only. The order granted plaintiffs' motion for a new trial in the event that the judgment n.o.v. was reversed on appeal. In addition, the order specifically found that "[t]here is no just reason for delaying enforcement or appeal of this judgment" and that "[t]his Judgment

shall be a final and appealable judgment." Defendant filed a timely notice of appeal, asking that the judgment be reversed and that the jury verdict be reinstated.

After an examination of the record and consideration of the briefs and arguments of counsel, we have determined that an opinion in this case would have no precedential value and that no substantial question is presented.

Supreme Court Rule 304(a) provides in part: "If multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying enforcement or appeal. (Ill. Rev. Stat., 1970, ch. 110A, par 304(a).) However, if there is no final order or judgment, a trial court cannot confer appellate jurisdiction merely by finding that there is no just reason for delaying enforcement or appeal. Davis v. Childers (1965), 33 Ill. 2d 297, 211 N.E. 2d 364.

In Martino v. Barra (1967), 37 Ill. 2d 588, 229 N.E. 2d 545, the Supreme Court addressed the precise situation presented in this case. In Martino, a personal injury action, the jury returned a verdict in favor of all defendants. The trial court subsequently granted plaintiff's motion for a judgment n.o.v. with regard to two of the defendants on the issue of liability and ordered a new trial on the question of damages. The trial court's order recited that there was no just reason for delaying appeal of the order. The appellate court initially reached the merits of the case, but on a motion for reconsideration, the court con-

cluded that it lacked jurisdiction because the trial court had not entered a final judgment as to two of the defendants. The supreme court affirmed the dismissal holding that "where, as here, a judgment n.o.v. on the issue of liability only is awarded a claimant, and a trial on the issue of damages is yet to occur, there is no final order upon which the party against whom the judgment n.o.v. has been awarded may predicate an appeal." 37 Ill. 2d at 594, 229 N.E. 2d at .(sic) (See also Davis v. Childers (1965), 33 Ill. 2d 297, 211 N.E. 2d 364.) Because in this case a trial on the issue of damages is still to occur, the trial court did not enter an order which is final and appealable.

Accordingly the appeal is dismissed for want of jurisdiction.

APPEAL DISMISSED.

WOODWARD, UNVERZAGT, VAN DEUSEN

APPENDIX B

Opinion on Rehearing

STATE OF ILLINOIS
APPELLATE COURT SECOND DISTRICT
Elgin, Illinois 60120

July 23, 1980

THE COURT HAS THIS DAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

Gen. No. 79-496

Ernest Wagner and Achsia Wagern, (sic) plaintiffs-appellees, v. Milledgeville Farmer's Elevator Co., a corporation, defendant-appellant. Stanley S. Wagner, plaintiff-appellee, v. Milledgeville Farmer's Elevator Co., a corporation, defendant-appellant.

Petition for rehearing by appellant denied, and Supplemental Order filed and attached hereto.

LOREN J. STROTZ, Clerk

Bernard P. Reese, Jr.
John A. Leemon

NO. 79-496

ERNEST WAGNER and ACHSIA WAGNER, Plaintiffs-Appellees, v. MILLEDGEVILLE FARMER'S ELEVATOR CO., a Corporation, Defendant-Appellant. STANLEY S. WAGNER, PLAINTIFF-Appellee, v. MILLEDGEVILLE FARMER'S ELEVATOR CO., a Corporation, Defendant-Appellant.

SUPPLEMENTAL ORDER UPON DENIAL OF PETITION FOR REHEARING

Defendant has petitioned for rehearing expressing a concern that the order dismissing its appeal does not clearly indicate whether or not defendant will be precluded from raising the propriety of the trial court's judgment n.o.v. on any subsequent appeal.

In our order disposing of this appeal under Supreme Court Rule 23, we indicated that defendant's appeal pursuant to Supreme Court Rule 304 was dismissed for want of jurisdiction because "where, as here, a judgment n.o.v. on the issue of liability only is awarded a claimant, and a trial on the issue of damages is yet to occur, there is no final order upon which the party against whom the judgment n.o.v. has been awarded may predicate an appeal." (Martino v. Barra (1967), 37 Ill. 2d 588, 594, 229 N.E. 2d 545, .) (sic) Defendant's concern is that the decision in Robbins v. Professional Construction Co. (1978) 72 Ill. 2d 215, 380N.E. 2d 786 would preclude review of the issue on the judgment n.o.v.

regarding liability on an appeal after the trial on damages.

In Robbins, defendants first appealed pursuant to Supreme Court Rule 306, which allows a party to appeal an interlocutory order for a new trial. A petition for appeal of an order granting a new trial is the only way to obtain review of such orders. The denial of such an appeal in Robbins precluded further review of that issue upon a second appeal. In the instant case, however, defendant appealed pursuant to Supreme Court Rule 304 which requires a final judgment as to one or more but fewer than all parties or claims. Absent such a final judgment or order, this court has no jurisdiction to hear the appeal.

REHEARING DENIED.

WOODWARD, VAN DEUSEN, UNVERZAGT Concur

APPENDIX C

Denial of Petition for Leave to Appeal

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL.62706

December 2, 1980

No. 53822 - Ernest Wagner, et al., respondents, vs. Milledgeville Farmer's Elevator Co., a Corp., petitioner (Stanley S. Wagner, respondent, vs. Milledgeville Farmer's Elevator Co., a Corp., petitioner). Leave to Appeal, Appellate Court, Second District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

/c/ Clell L. Woods

Clerk of the Supreme Court

APPENDIX D

ILLINOIS SUPREME COURT RULES

304. (Supreme Court Rule 304). Appeals From Final Judgments That Do Not Dispose of an Entire Proceeding

(a) Judgments As to Fewer Than All Parties or Claims - Necessity for Special Finding. If multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying enforcement or appeal. Such a finding may be made at the time of the entry of the judgment or thereafter on the court's own motion or on motion of any party. The time for filing the notice of appeal shall run from the entry of the required finding. In the absence of such a finding, any judgment that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable and is subject to revision at any time before the entry of a judgment adjudicating all the claims, rights, and liabilities of all the parties.

APPENDIX E

Ill. Rev. Stat.. Ch. 80, Sec. 31

31. Lien upon crops grown or growing.

"Every landlord shall have a lien upon the crops grown or growing upon the demised premises for the rent thereof, whether the same is payable wholly or in part in money or specific articles of property or products of the premises, or labor, and also for the faithful performance of the terms of the lease. Such lien shall continue for the period of six months after the expiration of the term for which the premises are demised, and may be enforced by distraint as in this Act provided."

APPENDIX F

CONSTITUTION OF THE UNITED STATES

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX G

CONSTITUTION
Of the
STATE OF ILLINOIS

Article I, Sec. 2.
Due Process and Equal Protection

No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.